No. 2963

# United States Circuit Court of Appeals

## For the Ninth Circuit

FORD MOTOR COMPANY, a corporation,
Plaintiff and Appellant,

vs.

E. A. FARRINGTON and L. A. HOUCK, co-partners, doing business under the name and style of PACIFIC TRANSFER COMPANY, J. DANIELS, H. SANDGATHE, doing business as SPRINGFIELD GARAGE, V. W. WINCHELL and F. M. HATHAWAY, co-partners, doing business under the name and style of EUGENE FORD AUTO COMPANY, and A. WILHELM and JOHN DOE WILHELM, co-partners, doing business under the firm name and style of A. WILHELM & SON,
Defendants and Appellees.

## BRIEF OF DEFENDANTS AND APPELLEES

UPON WRIT OF ERROR FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF OREGON

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Marsh Printing Co., 122½ Front St.

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### STATEMENT

Appellees desire to supplement the statement of the case made by appellant.

This is an action for claim and delivery under the Oregon statute brought by the plaintiff, a Michigan corporation, against Winchell and Hathaway, co-partners at Eugene, Oregon, and various parties who were agents of Winchell and Hathaway, and who are only nominal parties to the action. The facts out of which this cause of action arose, briefly stated, are as follows: Winchell and Hathaway were dealers in Ford automobiles at Eugene, Oregon, acting as such under contract with the plaintiff. While they had carried on this business for several years, contract with the plaintiff was made annually for a year at a time. The contract under which this controversy arose was made the 10th day of September, 1915, and expired July 31, 1916. Under the terms of the contract Winchell and Hathaway had agreed to take from the Ford Motor Company 286 Ford automobiles within the year, beginning September 15th, and ending July 31, 1916, and to pay the Ford Motor Company therefor $374 for each Touring Car, $331.50 for each Runabout and $786.25 for each Sedan, besides $53.25 freight from Detroit to Eugene on each automobile.

On the 24th day of May, 1916, Winchell and Hathaway had on hand thirty-seven Ford Touring Cars and one Sedan, for which they had paid Ford Motor Company $16,077.50. This was the full amount that the plaintiff was entitled to receive from Winchell and Hathaway for the cars, and

it had to be paid in cash before the railroad company was permitted to deliver the cars to Winchell and Hathaway and no further sum whatever remained to be paid the plaintiff, but as has been shown the Ford Motor Company demanded, and received, from Winchell and Hathaway full payment in cash for each car at the time the railroad delivered it to them.

On May 24, 1916, when Winchell and Hathaway were in possession of thirty-seven Touring Cars and one Sedan, for which they had paid the plaintiff $16,077.50 in cash, they received from the Ford Motor Company the following telegram:

"Portland, Oregon, May 24, 1916.
Eugene Ford Auto Company,
Eugene, Oregon.
Be advised that your contract is cancelled. The territory and your stock will be taken over by Vick Brothers, who will open a branch at Eugene.
FORD MOTOR COMPANY."

The day following this telegram one Goden, representing the plaintiff, arrived at Eugene, Oregon, and informed Winchell and Hathaway that he had come to Eugene to take the Ford business away from Winchell and Hathaway and turn it over to a firm by the name of Vick Brothers. He said that Vick Brothers would take the automo-

biles, the garage business, consisting of stock, merchandise and accessories, and office fixtures; that these would be paid for at invoice price, or cost to Winchell and Hathaway at Eugene; that the Ford Motor Company would return to Winchell and Hathaway their deposit of $800, which they had been required to deposit with the Ford Motor Company at the time of the execution of the contract; and that the Ford Motor Company would pay to Winchell and Hathaway a bonus, or rebate, on the amount of business they had done, including all cars purchased to date under the terms of the contract. (Tr. 218-219.) Mr. Goden also urged Winchell and Hathaway to accept this proposition, stating that he would not be surprised if they resented it, but it was the best thing for them to do; that the Ford Motor Company was a very large concern and would undoubtedly keep the matter in the courts for an unlimited length of time if this proposition was not accepted. This is the undisputed evidence in the case. (Tr. 219-220.)

This proposition was made verbally by Goden and Winchell and Hathaway said they would accept. Pursuant to this proposition Vick Brothers came to Eugene and started to invoice the stock, putting up $1,000 as earnest money, and Mr. Goden went to Portland to report to the management of the Ford Motor Company.

Mr. Goden returned to Eugene a day or two

later, and when asked if he had come back with the money to close the deal stated that he had not and that obstacles had been found in the home office to carrying out this proposition. Goden thereupon stated to Winchell and Hathaway, and their attorney, Mr. Charles A. Hardy, that his company would not return the deposit money of $800, nor would it pay the additional 5 per cent rebate on the amount of business done to date. (Tr. 221.) This interview took place in the hotel at Eugene at night, and Mr. Goden asked if Winchell and Hathaway would accept the money paid for the cars if it was tendered, and that he had the money available where he could get it out of the bank the next morning. Mr. Hardy then stated, speaking for Winchell and Hathaway, that they would take the matter under advisement. Mr. Goden then stated that the offer was withdrawn then and there. (Tr. 221-222.)

Thereupon, without demand or tender, this action of replevin was commenced, and the United States Marshal, armed with a writ of replevin, took possession of the automobiles, and the plaintiff took possession of their garage business and turned the same over to Vick Brothers. Such garage business consisted of a general garage, accessories and motor supply business, including oils and gasoline.

The evidence is undisputed that no demand was made upon the defendants for the possession of

the cars prior to the action and the seizure of the cars by the United States Marshal.

(Tr. 84.)

"Q. And you at no time, prior to the Monday that the Marshal took these automobiles, asked them for the automobiles in question?

A. No, I do—no.

Q. Made no demand upon them?

A. No."

## DEMAND

It is conceded in the brief of the appellant that no demand was made, and claimed that no demand was necessary.

## TENDER

It is conceded in the brief of appellant that no tender was made Winchell and Hathaway of the $16,077.50 paid by them to the plaintiff for the automobiles, and it is claimed on behalf of the appellant that no tender was necessary to entitle them to a recovery of the automobiles. In other words, the plaintiff claims that it was entitled

to the possession of the automobiles, and also entitled to retain the sum of $16,077.50 paid the plaintiff by these defendants, which was the full value and the full price to be paid the Ford Motor Company for the cars.

The court directed the jury to return a verdict in favor of Winchell and Hathaway for the return of the automobiles, or the value thereof, and this is the principal error complained of by the appellants in this action. It was held by the court, and insisted here by the defendants, that the plaintiff was not entitled to maintain an action of replevin of the automobiles on the undisputed evidence in the case.

The evidence is undisputed that not only was the full payment and full value of the cars paid in cash by Winchell and Hathaway to the Ford Motor Company and that no further payments were to be made, but also that receipted invoices for the automobiles in question marked "Sold to Eugene Ford Auto Company, Eugene, Oregon. Terms strictly cash," were delivered to Winchell and Hathaway when the cars were paid for.

Not only did the plaintiff demand, and receive, from defendants full payment for the cars as delivered, but plaintiff gave to defendants receipted vouchers for each car as paid for, describing each car by its number, the material part of the voucher being in words as follows:

(Tr., pp. 206-212, inclusive.) (Defendant's Exhibit "F.")

"Ford Invoice

Ford Motor Company
Portland

Sold to Eugene Ford Auto Company,
Eugene, Oregon.

Charge same. Order date June 2, 1915.

Terms Strictly Cash. Shipped June 2, 1915.

Customer's Order
Contract Shipped via

etc."

This form of doing business had been carried on between the Ford Motor Company and these defendants during the year 1914-15, and also during 1915-16, and never otherwise.

The plaintiff in this case contends that this transaction created a bailment and not a sale, for the reason that the Ford Motor Company specified the territory in which the cars were to be sold by Winchell and Hathaway, limiting the same; specified the persons to whom the cars should be sold, limiting the same; and specified the price at which Winchell and Hathaway were to sell these automobiles; and declared that for the purpose of enforcing these provisions of the contract that the

cars should be deemed the property of the Ford Motor Company until re-sold by Winchell and Hathaway. The appellant also claims, and devotes the major portion of its brief to the contention, that this contract is not in violation of the anti-trust laws of the United States.

## POINTS AND AUTHORITIES

### I.

It is conceded that Winchell and Hathaway were rightfully in the possession of the automobiles and had paid to Ford Motor Company the full purchase price in cash that was to be received by the appellant. Therefore, a demand was necessary before an action of replevin could be instituted or maintained, not only as a matter of procedure but as a condition precedent under plaintiff's own contract to the creation of its claim to procure from Winchell and Hathaway the automobiles in question. Under plaintiff's own contract, before it could claim the option to obtain the cars from Winchell and Hathaway, it must have first made a demand for the same. (Sec. 49 of the contract, Tr. 72.)

**Albright v. Browne, 54 Ore. 599.**
**People's Furn. Co. v. Crosby, 57 Neb. 282; 73 Am. St. Rep. 504.**

II.

The rule whereby a demand is unnecessary where the defendant contests a case on the merits, does not apply to cases where a demand is necessary, not only to render further detention by the defendant wrongful, but also to create in the plaintiff the right to possession.

**People's Furn. Co. v. Crosby, 57 Neb. 282; 73 Am. St. Rep. 504.**

III.

Plaintiff's own contract provides that it must return to the defendants the purchase money paid the plaintiff for the automobiles in question before it can obtain the automobiles from defendant, (Tr. 72, Sec. 49 of Contract) therefore, the tender of $16,077.50 to the defendants was a condition precedent to the creation of a right to claim the right by the plaintiff to replevin the automobiles, otherwise the plaintiff would be entitled to keep the full price received from defendants for its cars and also have the cars.

**Freeman v. Trummer, 50 Ore. 287.**
**Latham v. Davis, 44 Fed. 863.**

IV.

The plaintiff alleged in its complaint that a de-

mand and tender was made, and with its amended complaint paid into the court the sum of $3,401.12, claiming that this was the amount of the defendant's property in the cars. It now claims a tender would have been futile, but plainiff prosecuted this case upon the theory that a demand and tender were essential, whereas in its brief it argues that they are unnecessary, but the rule of law, as we understand it, is that plaintiff cannot take one position in the trial court and an opposite position in the appellate court to secure a reversal.

**Western Union Tel. Co. v. Thompson, 144 Fed. 578, Pt. 4. (5 C. C. A.)**

V.

The delivery of the cars by the plaintiff to the defendant, upon payment of their full purchase price in cash, for the purpose of re-sale by the defendants to the public constituted a sale and not a bailment.

**Motion Pictures Patents Co. v. Universal Film Mfg. Co., decided April 9, 1917, by the U. S. Supreme Court.**

**Jesse Isador Straus v. Victor Talking Mach. Co., decided April 9, 1917, by the U. S. Supreme Court.**

(At the date of writing this brief these decisions were not published in any legal publication, but have been sent out by the Department of Justice to the officers thereof.)

VI.

The parties in dealing under the contract for two years treated it as one of sale and not of bailment, and the second further and separate answer and defense to the complaint (Tr. 10-11) is sustained by the undisputed evidence in the case.

This action of replevin was instituted to enforce a claimed contractual right and the contract itself is invalid.

**Clayton Act (Act of Oct. 15, 1914, Chap. 323). U. S. Comp. Stat., Vol. 8, Title 56, Sec. 8820-8836, p. 9606-9698.**

VII.

The identical contract was held invalid by the U. S. District Court for the District of Oregon and no appeal was ever taken from the decision.

**Ford Motor Co. v. Boone, et al. (Ore.) Bean, J., decided about August, 1916.**

## VIII.

The contract is within the condemnation of the Sherman Act, as amended by the Clayton Act, in the following particulars

First, its entire purpose is to permit the Ford Motor Company to sell its automobiles to its alleged "agents," make them pay in full cash upon delivery, and at the same time permit the Ford Motor Company to control and prescribe,

(a) The method of sale.

(b) The parties to whom sale shall be made.

(c) The territory limits.

(d) To fix the price of the sale.

(e) To penalize any dealer in Ford automobiles who violates any of its provisions by cancelling his contract and imposing a series of fines, or forfeitures, or losses, upon him regardless of damages which may or may not flow from such breach.

That these clauses are in conflict with the U. S. statutes relating to monopolies and combinations in restraint of interstate trade is plain from the following sections of those acts.

**U. S. Comp. Stat. 1916, Ann. Vol. 8, Sec. 8835-a, p. 9680, Sec. 8835-b, p. 9681.**

IX.

As the plaintiff seeks in this action of replevin to enforce a claim of contractual right under a contract void for conflict with the criminal laws of the United States the court should sua sponte dismiss its action and affirm the judgment.

**Ah Doon v. Smith, 25 Ore. 89.**

X.

DAMAGES

The contract itself permits the recovery of damages for the profits on the cars (Sec. 51, Tr. 73).

XI.

In an action of replevin whatever damages have been actually sustained may be recovered, and the defendants are entitled to recover all legal damages they have sustained.

**Stevens v. Tuite, 104 Mass. 328, 335.**

XII.

As the contract itself provides there shall be no

liability for damages asserted against the Ford Motor Company except as to matters pending, the profits on the cars that were taken would necessarily be a matter pending, and the plaintiff under its own contract would be liable for the loss of profits on the cars taken pursuant to its cancellation of the contract.

XIII.

The rule that damages which are uncertain or contingent cannot be recovered can not be applied to an uncertainty as to the amount of benefit or gain to be derived from performance.

**Bredemeier v. Pacific Sup. Co., 64 Ore. 580.**

XIV.

The taking of the automobiles deprived the defendants of their profit on the re-sale of the cars, and the defendants also show that the taking of the cars resulted in breaking up the business in which the defendants were engaged, thereby causing the defendants to lose—

1. The profits on the automobiles.

2. The use of their money invested in the business.

3. The breaking up of their general garage, motor supply and accessory business, which was an established business.

The evidence was received without objecton as to these damages, and the damages were the direct and proximate result of the wrongful taking of the cars. Evidence of these elements of damage was received without objection, and the amount of damages was properly submitted to the jury under the instructions of the court.

## XV.

The amount of damages awarded was $6,000. It is conceded in the brief that the profits on the automobiles taken, at the price fixed by the Ford Motor Company, would amount to $2,477.75. The undisputed evidence is that the garage business was making a profit of $300 per month. The appellant in its brief figures that the damage for the loss of the business should be limited to $300 per month from the time of the commencement of the action to the date of trial, and amounting in the aggregate to $1,030, leaving $3,507.75 in dispute. Appellant therefore concedes that the verdict for damages is fully sustained, except as to $3,507.75, and therefore we say the judgment should be affirmed and the only question involved is whether we should remit the $3,507.75 or not.

We insist that loss of our business, paying a profit of $300 per month, and the evidence that we were prevented from engaging in any other business because of the fact that our entire capital was invested in the cars taken, made the question of amount of damages a question of fact for the jury, and that the amount awarded is not excessive.

## ARGUMENT

### DEMAND AND TENDER

Points I, II, III and IV will be considered together. They relate to the necessity of a tender to the appellees of the sums paid by them to the appellant for the machines before they took such machines into their possession. This was the full price—the extreme value in the original sale from the appellant to the appellees.

The contract says (Tr. 72, Cl. 49):

"In case of the cancellation or expiration of this contract the first party may, at its option, retake possession of all such of the aforesaid automobiles as second party may have on hand on consignment unsold at the date of such cancellation or expiration, at the **same time returning to him his ad-**

vancements on the said automobiles."

By the contract the Ford Motor Company, having received from its "agent" the full purchase price of the machines, stipulated that the agent should have possession thereof until

(a) The contract was either cancelled or had expired, and

(b) The "advancements" made by the agent were returned to him.

It is plain that the Ford Motor Company had **no right** to claim the possession, or to institute proceedings to obtain possession of the automobiles for which it had been fully paid until it had first tendered back the sums so paid by its agents to it. This tender is a condition precedent to the establishment of the right.

**Freeman v. Trummer, 50 Ore. 287 (292, 293).**

**Otherwise, the Ford Motor Company would be entitled to keep the full purchase price of the machines and also recover the machines.** (See cases under Points I and II heretofore.)

Like argument demonstrates the necessity for a demand.

Appellant does not contend that it made either a demand or a tender within the meaning of the contract before instituting this suit, and the judgment against it should be affirmed on these two points alone.

The cases holding that a demand is not necessary are those wherein the original possession was wrongful, but here it is conceded the appellees were rightfully in possession. Counsels state that whatever the rule may be elsewhere that the Supreme Court of Oregon has said in Brown v. Truax, 58 Ore. 572:

"Where the defendant in his answer claims title to the property no proof of demand is necessary."

In the case of Brown v. Truax, upon which counsel relied, the Supreme Court of Oregon expressly bases its decision on the fact that the possession of the defendant was under all circumstances wrongful. The Supreme Court of Oregon squarely holds, in the case of Albright v. Browne, 55 Ore. 599, where the answer denied the allegations of the complaint and averred that the defendant was the owner of the property described, "It was essential to aver and prove a demand for the goods, but having failed to do so a non-suit was proper." The leading case on the question is People's Furn. Co. v. Crosby, 57 Neb. 282, 73

Am. St. Rep. 504, and this authority is quoted by all the text writers who speak upon the distinction, where a demand is necessary not merely to lay the foundation for a remedy but to complete a right of possession in the plaintiff. When a demand is necessary to complete a right of possession in the plaintiff, the defendant by claiming title does not waive such requisite thereto.

In the instant case the appellees were rightfully in possession and not merely as a matter of procedure, but in order to create claim of right under the contract the appellants were required to make a demand and it was a condition precedent to the **existence of a cause of action.**

Counsel argues that no tender was necessary on the theory that a tender would have been futile. The evidence shows, not only that no tender was ever made, but that when the appellees were asked whether or not they would accept a tender if offered, and answered that they would take the matter under advisement, they were then and there told the offer was withdrawn.

(Tr. 179.)

"Q. You simply told them the money was there and you could give a check the next morning, and I told you we would take it under advisement, didn't I, and you said the offer was withdrawn, didn't you?

A. I told you at the time, speaking to you at the time, as far as you were concerned, the offer was withdrawn. I was talking to Hardy."

(Tr. 180. By Mr. Hardy.)

"Q. When I told you we would take the matter under advisement, didn't you then and there say the offer is withdrawn?"

Answer by Witness Goden, plaintiff's agent, "I said, 'No advisement in this case so far as you are concerned.' The offer is withdrawn. That was you.

Q. As the three of us walked out of the room didn't you follow us out of the room and repeat

'The offer is withdrawn,' shaking your fist?

A. I have no recollection of that. I had no reason for shaking my fist."

(Tr. 221. Direct examination of V. W. Winchell.)

"Q. What was then said?

A. Mr. Goden then asked us—I believe the

next thing in the line of succession was that Mr. Goden asked us if we would accept this money if it was tendered, and our attorney, Mr. Hardy, told him we would take it under advisement. I distinctly remember Mr. Goden at that time saying that the offer was withdrawn then and there, and as Mr. Hardy repeated—Mr. Hardy has told you before, Mr. Goden repeated again in the hallway, 'The offer is withdrawn.'

Q. Did you see him any more after that with respect to this matter?

A. I believe the next time that we saw Mr. Goden was at the time that the cars were replevined by the United States Marshal.

Q. Did Mr. Goden, or anyone else, ever tender you either cash, check or draft, or anything else for this money?

A. No, sir.

Q. Or any money?

A. No, sir.

Q. And did he, or anyone else, make any demand on you for the cars?

A. No, sir."

This evidence is the undisputed evidence in the case, and we submit that it is begging the question for counsel to claim that the appellees had ever said or done anything that would render a tender futile; furthermore, the only tender made by the appellants is the tender of $3,401.12, and this was tendered after the action was commenced and the cars taken, and this amount of money paid into court with their amended complaint. (See Par. 7, Amended Complaint, p. 6 of Tr.) No money was tendered into the court with the original complaint, and no tender was pleaded. The Amended Complaint having been filed the original complaint goes out of the case and becomes functus officio as a pleading.

The appellant brought into court the sum of $3,401.12 and admits that the amount paid by the appellees to the appellant was $16,077.75, which sum they were required by their contract to tender back before having any right whatsoever; furthermore, the appellant brought into court, on the theory that it must bring into court some sum of money, the sum of $3,401.12 only, and alleged that this was the amount it was ready to pay defendants, and also alleged (Amended Complaint, par. 7, Tr. 7) "which amount is the defendants', Winchell and Hathaway's, property in said cars at this time."

The Amended Complaint was filed August 14,

1916, long after the action was instituted. In view of this pleading it does not lie in the mouth of the appellant to say that it was excused from making a tender on the theory that a tender would have been futile.

## INCONSISTENT POSITIONS

The Amended Complaint was framed upon the theory that demand and tender were both necessary, the Amended Complaint alleged both, plaintiff sought to keep "a" tender good by depositing the sum of $3,401.12 with the court when the Amended Complaint was filed, it recognized the force of the positions above argued and tried its case upon the theory that it had made both a tender and demand. It injected these issues into the case, there is no allegation excusing either, whereas on this appeal it seeks to evade both the tender and demand by arguing that neither is necessary.

At the time the Amended Complaint was filed the Answer of defendants had been on file many weeks, and if the Answer was sufficient to excuse both a tender and demand, then appellants would not have alleged either in their Amended Complaint.

It is well settled that a party to a lawsuit cannot thus take inconsistent positions, nor can he

mislead the trial court by trying his case upon one theory and procure a reversal upon a different theory.

**Western Union Tel. Co. v. Thompson, 144 Fed. 578, Pt. IV.**

**Long v. Lockman, 135 Fed. 179 (199).**

**Brooks v. Laurent, 98 Fed. 647, 654.**
**The New York.**

**Smith v. McAllister, 113 Fed. 810 (811).**

**Pollitz v. Wabash Ry., 167 Fed. 145, Pt. V, discussed p. 164.**

**Seminole Securities Co. v. Southern Life Ins. Co., 182 Fed. 85 (94-95).**

**Davis v. Wakelee, 156 U. S. 680 (39:578).**

## DAMAGES

The jury returned a verdict of $6,000 damages, and the appellant claims that the court erred in instructing the jury that they might take into consideration, in arriving at their estimate of the damages suffered by the defendants because of the wrongful taking of the cars, first, the profits which

the defendants might have earned by the re-sale of the automobiles replevined. The profits to be derived under plaintiff's own theory were not contingent or speculative, the plaintiff claiming that there was a ready sale for all Ford automobiles at a retail price of 15 per cent over the amount paid the plaintiff by the dealer. The evidence is undisputed that Winchell and Hathaway could have sold all of these cars at a profit of 15 per cent. The appellant is bound by this proposition for the reason that it has fixed the amount of profit itself that the dealer is supposed to make at 15 per cent, and thereby fixed the value of the machine to the dealer.

The appellant bases its argument that no recovery should be had for the wrongful taking of the cars on Par. 51 of its contract, which provides that the second party shall have no claim to commission or damage, notwithstanding transactions may thereafter take place with, or sales be made to parties with whom the second party shall have dealt during the currency of this contract. All this means is that if the Ford Motor Company itself should sell automobiles at the termination of the contract to parties with whom the dealer had previously been negotiating, then the dealer should have no claim to a commission on the transaction or for damages.

This provision of the contract expressly excepts

matters pending at the date of the termination of the contract. This provision of the contract does not purport to go further than to permit the Ford Company to itself sell cars to prospects that the agent had, and to whom he might have sold cars had the contract not been terminated.

In other words, at the time of the conclusion of the contract the agent might have demonstrated the car to several hundred people, whom he had listed as prospects, or with whom he had negotiated, and under the termination of the contract the Ford Company might come along, find these people and sell them automobiles and all that the contract provides for is that it shall not be liable in such event for commissions or damages.

This provision of the contract in no way precludes the dealer from claiming damages for cars that he had bought and paid for, and which belonged to him, and which he might have sold had not the Ford Motor Company wrongfully seized the same, but on the contrary expressly excepts **matters pending.**

This is a sufficient answer to the contention that the dealer was not entitled to damages for the profits he would have made on these machines had they not been wrongfully taken from him.

This item of the damages is figured by the ap-

pellant at $2,477.75, and the appellant in its brief concedes that this is the absolute fixed profit that would have been made by the dealer from the sales of these cars alone had not they been wrongfully taken from him.

It is also claimed (Assignment of Error No. 3, Tr. 35) that the court erred in submitting to the jury whether or not the taking of the thirty-seven automobiles destroyed or injured the business in which the defendants were engaged. The defendants pleaded the injury and destruction, and their claim for damages on account thereof, due to the wrongful taking of the automobiles and evidence of the fact of the destruction of defendants' business and the consequent damage, was offered and received without objection on the part of the appellant.

Commencing at page 230 of Transcript of Record, to the commencement of the Cross-Examination on page 234, the testimony of the defendant Winchell as to the destruction of the defendants' business was received without any objection whatever, and the witness was cross-examined on the same questions. There was no objection whatsoever to the testimony of this witness on the question of the damages, and it was shown by this witness that the business of the defendants was paying them at the rate of $300 a month, and that

the same was destroyed as a result of the wrongful taking of the automobiles, because at the very time that the plaintiff cancelled the agency and replevined the cars they were undertaking to require the defendants to turn over their general garage and motor supply business to Vick Brothers, and as a result of their action in this respect the entire business of the defendants was destroyed.

Likewise, the testimony of the witness Hathaway to the same effect was received with only one objection on the part of the appellant (Tr. 262-263). This objection was made to the question as to whether or not the defendants had any other opportunities to go into business during the time between the taking of the cars and the trial of this action, and the basis of the objection as made was that this would not tend to show damage. The testimony was received on the theory that the capital of the defendants was tied up in these automobiles, and when they were taken by the plaintiff and the plaintiff at the same time retained the $16,077.50 that they had received from Winchell and Hathaway, all of the available capital of Winchell and Hathaway was tied up so that they were unable to go into any other business (Tr. 263). The appellant then thoroughly cross-examined witness Hathaway on the question of the profits of his business and his opportunities to go into business; then on re-direct examination, and after

witness Hathaway had testified without objection, and after the witness Hathaway had been cross-examined on the question, on re-direct examination in response to the matters brought out by the appellant through his cross-examination, the witness Hathaway was permitted to testify further in regard to the matter (Tr. 282, 283, 284, 285). All without any objection whatsoever on the part of appellant.

On page 262, of Transcript of Record, and without any objection whatsoever, the witness Hathaway likewise testified that the damage suffered by the defendants on account of the destruction of their business, caused by the plaintiff's wrongful seizure of the cars, was a matter of $300 a month, which the business was then paying as a profit to Winchell and Hathaway.

After trying the case on the theory that these damages flowed from the wrongful taking of the cars, and after the testimony was offered and received without any objection whatsoever on the part of appellant, appellant now claims for the first time, and on this appeal, that these damages were not recoverable in this action.

Likewise in this case they tried to minimize the damage by offering evidence on the same question themselves in undertaking to show that de-

fendants had voluntarily sold the garage business to Vick Brothers. Appellant failed to prove a voluntary sale to Vick Brothers, for the evidence disclosed only an executory contract which was a part of the proposed deal offered by the plaintiff in the first place, when the agent Goden offered to pay the defendants the price of the cars, plus bonus or rebates and deposit money, and then afterwards the plaintiff refused to carry out this proposition and the transaction was not completed through the fault of the plaintiff.

How can the plaintiff, after making no objection to the testimony offered on the part of the defendants and then offering evidence on the same question itself, come before this court on an appeal and claim any error on the part of the court in submitting this very question of the amount of such damages to the jury? Furthermore, the appellant did not ask the court to take this evidence from the jury nor did it offer any appropriate instruction or request any appropriate instruction taking it from the jury, but on the contrary asked the court to instruct the jury that the damages be limited to $1,000. (Request No. 7, Tr. 117.) The appellant also made a request that no damages whatsoever be allowed, but this is inconsistent with its request that the damages be limited to $1,000, and after the evidence was received as to damages without objection the appellant was in no position

to ask the court to instruct the jury that no damages whatever should be allowed for the wrongful taking of the cars; **consequently we find that the records show that the appellant is raising the question as to the elements and items of damages for the first time on this appeal.**

The appellant also claims in its brief, though it did not claim it at the trial of the case, that while the uncontradicted evidence, received without objection, shows that the defendants' business which was destroyed by the plaintiff was paying a profit of $300 a month, that the court should have limited this from the time of the commencement of the action up to the date of trial, thereby limiting it in amount to the sum of $1,030. **No such suggestion was made at the trial in any manner whatsoever;** BUT ON THE CONTRARY THE APPELLANT REQUESTED INSTRUCTION NO. XI, AND CITED ITS REFUSAL AS ERROR. That instruction reads (Tr. 37, Error No. 4):

"The burden is upon the defendants to prove by a preponderance of the evidence, that the automobiles here in question are of the value they allege, namely $18,555.25, and that they have been further specially damaged in the sum of $25,000, and unless defendants do convince you by a preponderance of the evidence, to this effect, then they have failed and your verdict should be against them."

Bearing in mind that the appellant itself requested this instruction, how can they complain when the court substantially gave the instruction, for the court instructed the jury (Tr. 122, 123) that the burden of proof was on the defendants to prove these very damages and the court gave the very instruction requested by the appellant, using substantially the same language as the request was framed in, but amplifying it, and gave the instruction in a more conservative form than asked for by the appellant?

In other words, the court protected the appellant from the extent and generality of damages which it requested him to instruct upon.

Upon this appeal will the court permit the appellant to claim reversible error based upon its own request? It is fundamental that invited error can never be assigned for reversal.

## ANTI-TRUST ACTS

Appellant seeks to inject the construction of their contract under the Anti-Trust Acts, commonly known as the Sherman Act, with its amendments, and the Clayton Act of October 15, 1914. This is not in the case as tried and the court expressly ruled it out.

(Tr. 306, 307.)

"COURT: The other issue is the amount of damages if any the defendants suffered by reason of taking these cars?

MR. SMITH: Yes, your Honor, that is one issue, and another matter, in order that we may know how to present it to the jury. The whole case as we view it falls under the Anti-Trust Laws of the United States. Now, in our answer there is a prayer for and an asking for punitive damages.

COURT: I think you can pass that, for I don't think there is any evidence on which to base it.

MR. SMITH: Then we thought the case would fall under the Clayton Anti-Trust Act instead of under the common law, and being under the Clayton Act we ask for single damages. * * *

MR. SMITH: I understood your honor to rule this case came under the Clayton Act.

COURT: No, I made no ruling. I don't think it is material in this case whether it comes under one act or the other.

MR. SMITH: No ruling. Will the plaintiff

have the opening and closing on our defenses, or will we have it?

COURT: They will have it."

The defendants, and appellees herein, requested the lower court to rule this case under the Clayton Act, but the court refused to do so; and this ruling is not assigned as error and no exception was taken to the ruling.

With the record in this condition appellant seeks to inject the construction of its contract, asking this court to determine whether it is violative of the trust and monopolies statutes of the United States, although it was expressly stated at the trial and its elimination was not excepted to, nor is it embraced within the assignments of error and its elimination was in favor of the appellant.

We firmly believe that the appellant is seeking to inject the construction of the contract to ascertain its validity under the Anti-Trust Laws of the United States solely for the purpose of attempting to predicate some ground for a review in the Federal Supreme Court when this judgment is affirmed by your Honors. We do not concede that the construction of this contract, or its validity when tested by the Anti-Trust Laws of the United States is properly involved, or involved at all, in this

appeal, but if this court should consider that it is so involved then we respectfully contend that the contract is expressly voilative of those acts within the meaning of the cases heretofore cited, because it attempts—

1. To place a territorial restriction upon the power of every selling agent;

2. To fix the price of re-sale of these articles, and hence is in direct restraint of trade;

3. To provide punishments, forfeitures and damages for violation of any of its provisions;

4. To dictate the persons to whom the "selling agents" may transfer the cars for which they have already fully paid.

Appellant argues that the Ford automobile is a patented article, but the patent laws of the United States do not in any manner confer the right upon a patentee to violate the criminal statutes invoked against the creation of trusts. And in

**Motion Picture Patents Co. v. Universal Film Mfg. Co., decided April 9, 1917, by the Federal Supreme Court;**

**Straus v. Victor Talking Machine Co., decided April 9, 1917;**

the invalidity of contracts similar, and for the same purpose as that at bar, was clearly settled. It was there stated that the object of the patent laws is to give "to the inventor the exclusive use of just what his inventive genius has discovered."

Does appellant contend that the inventive genius of Mr. Ford reaches to the stifling of competition and restraint upon interstate commerce in violation of the plain letter of the Anti-Trust Laws? Does it argue that the restriction of re-sale of a patented article is a part of the inventive genius of a man who makes an engine?

It might be that Mr. Ford is the only man who ever patented a device to convince people that walking is a pleasure but that isn't the basis of the complaint of appellant.

We respectfully submit under the authorities heretofore cited that the contract involved is clearly violative of the Anti-Trust Laws of the United States and for that reason the plaintiff has no standing in this court.

## SALE, NOT A BAILMENT

In the answer in this case it is alleged that under the entire course of dealing between plaintiff and defendants under the contract involved,

the transaction was treated by both parties as a sale and not a bailment. The undisputed evidence shows that the cars were in fact sold to Winchell and Hathaway and there was no bailment. Therefore the judgment necessarily must be for the defendants for manifestly the plaintiff could not replevin the cars to which the title was rightfully in Winchell and Hathaway. The plaintiff did not claim these cars by right of repurchase, but on the theory that the title had never passed, and that is appellant's position in its brief before this court.

The defendants both testified that they paid Ford the full purchase price to be paid for the automobiles upon delivery of the cars and that during three years of dealing under this form of contract this manner of doing business was never varied. No evidence was offered to dispute these facts. (Note the testimony of the defendant Winchell, Tr. 224.)

"Q. From 1915 to 1916 did you ever pay any further price than the price they were invoiced to you at?

A. No, sir.

Q. And you received the cars?

A. Yes, sir.

Q. And sold them in the course of business?

A. Yes, sir."

(Testimony of defendant Hathaway, Tr. 261.)

"Q. Now, Mr. Hathaway, in all the years you have dealt with them has there ever been a time, a single instance, but what you have had to pay for the car on delivery to you?

A. No, we only pay the one price.

Q. And you pay that on delivery of the car?

A. Yes.

Q. And you treat the car as yours and go on and sell it or dispose of it as you like?

A. Yes, sir.

Q. You have done that for three years?

A. Four, yes, I was with the Ford Motor Company.

Q. Were you ever called upon to pay any further price than the price you paid on delivery?

A. No, sir.

Q. In all the 437 cars that you sold at Eugene did you ever pay a cent extra over and above the price you were required to pay to get the cars?

A. No, sir.

Q. Were you ever asked to?

A. Never asked to.

Q. Did they ever claim anything different?

A. No, there was nothing."

All of this evidence was received without any objection and no witness in the case disputed it. How then can it be claimed that the cars were held under a bailment instead of an actual sale? It is inconceivable that the Ford Motor Company could deliver the cars to Winchell and Hathaway to be sold by them to the public in the ordinary course of trade, and delivered to Winchell and

Hathaway only upon full payment to Ford of all that they were to pay for them and the payment made in cash, and this be construed to be a bailment or anything else other than an outright sale.

This case has no relation to the Cole Motor Car case cited by the appellant in its brief, or any of the cases cited by it in which there was an actual bailment and not a sale. To call a sale a bailment does not change the character of the actual transaction, but its true character is to be determined—

(a) From the language of the governing contract;

(b) More especially from the course of dealing which both parties have adopted under it and where that course exists for a large number of years and is acquiesced in by both parties it is conclusive of the nature of the transaction.

In addition the appellant at Assignment XI assigned error in giving the following instructions:

"It also appears in testimony that at that time the defendants had in their possession some thirty-seven cars, which they had previously ordered from the plaintiff, upon which they had paid 85 per cent

of the list price, or all that they were expected or required to pay under the contract."

In specifically designating the pretended error in this instruction appellant used this language, in Transcript of Record, p. 42:

"For the reason that it appears from the face of the contract introduced in evidence upon the trial of the above entitled case, which contract was admitted by all parties, that the 85 per cent of the list price was only a portion of the consideration which the plaintiff and purchasers of its cars was to receive from the defendants in this case, and for the further reason that it was provided under and by virtue of the terms of said contract that upon the cancellation thereof the plaintiff might exercise its option to retake possession of the cars in controversy upon returning the 85 per cent advanced, and in event of its failure to exercise such option the defendants would make every reasonable effort to sell such cars within three months after the cancellation of the contract, and in the event of their inability to accomplish such sale said defendants would be entitled to purchase said automobiles by the payment of 10 per cent additional upon the list price and would have a lien upon the automobiles for the 85 per cent advanced."

The theory of the case of appellant is that a

tender was unnecessary, therefore it could replevin the cars and deprive the defendants of the right of sale, which it has done. At no place does it ask for the additional 10 per cent, nor does it say that it left the cars in the possession of the defendants for sale after the termination of the contract, therefore its own contention shows that it has been paid every cent to which it is entitled when it received the original sale price, and that it never tendered that back as a basis for the creation of a right of possession in appellant.

## FRIVOLOUS APPEAL

We have shown the following facts:

1. The defendants were rightfully in possession of these machines;

2. They paid the plaintiff its full purchase price before they took possession;

3. The plaintiff retook these machines by a writ of replevin without tendering back to defendants the sum which defendants had paid to plaintiff therefor;

4. No demand for their possession was made,

although the machines were rightfully in defendants' possession;

5. The question of the construction of the contract under Anti-Trust Laws was expressly ruled out of the case and the appellant took no exception to the ruling, nor did it assign it as error;

6. The instruction given concerning damages was more in favor of appellant than that which appellant asked;

7. The undisputed evidence shows a sale and not a bailment;

8. Even if the validity of the contract when tested by the Anti-Trust Laws is involved, its invalidity was established by a long line of cases decided long prior to the trial of this present case.

For all these reasons we assert that there is no bona fide question involved in this appeal and that it should be dismissed with the penalty provided, and especially do we urge this because the undisputed evidence of Winchell and Hathaway shows that Goden threatened them with prolonged and continuous litigation by appellant, which he asserted would use its vast wealth to keep any case which they might have with the Ford Motor Company in the courts indefinitely. (Tr. p. 255.)

We, therefore, respectfully submit that this is

a proper case in which to impose a penalty for a Frivolous Appeal.

Respectfully submitted,

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Due service by requisite number of copies hereby admitted this — day of May, 1917.

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Attorney for Appellant.